SUPREME COURT, U. S.
FILED
NOV 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-597

GARY MINKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

GARY MINKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Gary Minkin, prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on September 27, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported and is reprinted in the Appendix

hereto at page 1a. The Eighth Circuit's order of October 18, 1974 denying the petitions for rehearing and rehearing en banc is reprinted in the Appendix at page 16a.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 27, 1974. Petitions for rehearing and rehearing en banc were denied by order of the Eighth Circuit on October 18, 1974. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE TRANSMITTAL OF AN INSURANCE APPLICATION BY MAIL, WHERE THE USE OF THE MAILS IS FORTUITOUS AND IRRELEVANT TO CARRYING OUT THE ALLEGED FRAUDULENT INSURANCE SCHEME, SATISFIES THE REQUIREMENT OF THE FEDERAL MAIL FRAUD STATUTE THAT THE MAILING BE FOR THE PURPOSE OF EXECUTING THE FRAUDULENT SCHEME CHARGED.

STATUTES INVOLVED

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article for the purpose of executing such scheme or artifice or attempting so to do,

places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On August 2, 1973, petitioner Gary Minkin was charged with a single count of mail fraud in violation of the federal mail fraud statute—18 U.S.C. § 1341. After trial before a judge and jury in the United States District Court for the Eastern District of Missouri, a guilty verdict was returned on November 30, 1973. Petitioner was sentenced, on December 14, 1973, to three years imprisonment, with imprisonment to be suspended during a two and one-half year probation period. The suspension was conditioned on payment by petitioner of a sum of $2200 to the Hartford Insurance Group (Hartford). After affirming the conviction and denying petitions for rehearing, the Court of Appeals for the Eighth Circuit issued a stay of mandate on November 7, 1974 pending filing of this petition.

The fraudulent scheme charged in the indictment consisted essentially of the following elements: (1) procurement of insurance coverage from Hartford on an automobile represented to Hartford to be in good condition when, in fact, it had previously been damaged by fire; (2) fabrication by Edward E. Dace, a Claims Supervisor for Hartford, of a claim file for fire damage to the automobile; (3) issuance by Dace of a Hartford check payable to petitioner to cover the fire damage; and (4) receipt by

petitioner of approximately half of the proceeds of that check.

The only use of the mails alleged in the indictment consisted of a mailing, on December 29, 1969, of an application for insurance coverage on the automobile involved in the scheme charged. A Hartford insurance agent named Dobinsky was alleged to have mailed this application from his office in suburban St. Louis to the Hartford office in downtown St. Louis, a distance of some 12 miles. This mailing by a party not involved in the scheme charged was alleged to have been for the purpose of executing that scheme. However, no evidence was offered that the mailing had such a purpose. In fact, it is clear from the testimony offered by the Government's witnesses that the means chosen by Dobinsky to deliver the insurance application to Hartford's downtown office, and even the very application itself, were immaterial to the petitioner and of no significance to the alleged fraudulent scheme or Hartford's payment of the claim proceeds.

The fraudulent scheme charged in this case depended for its success entirely upon the fact that Dace, the Hartford insider, was able on his own authority to draw a check against Hartford for payment of what he knew to be a fraudulent claim. Dace admitted that he had committed numerous similar frauds against Hartford over a period of time and that, in this case, he had "dummied up the whole thing." When Dace made the check payable to petitioner for the proceeds of the claim, Dace knew that no loss had occurred, that the car had never been repaired and that the claim and proof of loss, which Dace prepared, were fakes. Under these facts, it is apparent that whether the insurance application was mailed or hand-carried to Hartford by Dobinsky, or whether it was

ever delivered to Hartford at all, was irrelevant to the fraudulent scheme.

Numerous uncontradicted facts, in addition to the very nature of the scheme charged, support the conclusion that the mailing alleged to have occurred on December 29, 1969 was not for the purpose of executing the scheme. First, the insurance was underwritten before the application was mailed after telephone conversations among Dobinsky, Dace and petitioner on December 18, 1969. The binder issued by Dobinsky on that date was valid until cancelled. No mailing occurred in connection with issuance of this binder. Second, Dace testified that he had seen Dobinsky "quite regularly" at the Hartford office delivering insurance applications and, clearly, therefore, Dace would not have concocted a scheme which depended in any way for its success on Dobinsky's mailing an insurance application to Hartford. Third, the application allegedly mailed on December 29, 1969, was returned without approval by Hartford to Dobinsky for recalculation of the premium. Accordingly, the only application which would have played any part in the scheme under any circumstances was not delivered by Dobinsky until some time later when he had recalculated the premium and collected it from petitioner. Fourth, Hartford did not process an insurance application received in the mails any differently from one delivered by hand. Finally, the scheme charged was conceived and carried out entirely within St. Louis County and the alleged mailing, if it occurred, covered a distance of no more than 12 miles. Use of the mails, therefore, was not in any way important to the scheme or its success.

REASONS FOR GRANTING THE WRIT

This case involves a very important question concerning the limits of federal jurisdiction under the federal mail fraud statute—18 U.S.C. § 1341. The United States Court of Appeals for the Eighth Circuit affirmed petitioner's conviction for mail fraud despite the fact that the alleged use of the mails by an innocent third party was wholly immaterial to petitioner or to the consummation of the fraudulent scheme charged in the indictment. This result ignores the explicit jurisdictional requirement of the mail fraud statute that the use of the mails must be "for the purpose of executing" a fraudulent scheme and is inconsistent with the standards set forth in *United States v. Maze*, 414 U.S. 395 (1974) and other decisions of this Court. See, e.g., *Parr v. United States*, 363 U.S. 370 (1960); *Kann v. United States*, 323 U.S. 88 (1944).

The Eighth Circuit's opinion gives scant attention to the purpose of the alleged mailing and focuses almost entirely on the questions of whether any such mailing occurred and, if so, whether it was caused by petitioner.[1]

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[1] In addition to the purpose requirement of 18 U.S.C. § 1341, essential elements of the federal mail fraud crime are that the mailing charged be proven and that the defendant be shown to have caused the mailing. The absence of these elements in this case are not offered as primary reasons for granting a writ of certiorari. However, petitioner wishes to draw the Court's attention to the fact that the existence in this case of even a single element of the federal offense of mail fraud is open to serious question. The evidence that the mailing charged had occurred consisted solely of one man's recollection of his personal habits four years prior to testifying and did not amount to proof of an unvaried custom, as federal courts have usually required where evidence of mailing is wholly circumstantial. See, e.g., *United States v. Ellicott*, 336 F.2d 868 (4th Cir. 1964); *United States v. Browne*, 225 F.2d 751 (7th Cir. 1955); *United States v. Baker*, 50 F.2d

[footnote continued]

The conclusion of the opinion makes a brief reference to the decision of this Court in *Maze*, *supra*, but the opinion nowhere indicates any awareness of the critical importance of the purpose of the alleged mailing to the assertion of federal jurisdiction under 18 U.S.C. § 1341. The discussion of this issue is contained in a short paragraph which reads in its entirety as follows:

> We should add that *United States v. Maze*, U.S. , 94 S.Ct. 645, 38L.Ed.2d 603 (1974) relied on by Minkin is inapplicable here. The mailing in *Maze* was held by the Supreme Court to have occurred after the scheme to defraud there involved had 'reached fruition,' or in other words had been executed. Here the mailing of the application was a salient factor in effecting the execution of the scheme. (Slip Op. p. 14-15) (App. at 14a.).

Under the Eighth Circuit's opinion, any use of the mails caused by the defendant in the course of carrying out a fraudulent scheme and prior to its completion would be a "salient factor" in executing the scheme and sufficient to justify federal prosecution. Such an approach eliminates any separate consideration of the statutory requirement that the mailing charged be "for the purpose of executing" the scheme.

This Court has often held that the federal mail fraud statute "does not purport to reach all frauds, but only

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122 (2nd Cir. 1931). Moreover, on the question of causation the Eighth Circuit appears to have applied a *per se* rule that anyone delivering an insurance application to an insurance agent can reasonably foresee that the agent will mail the application to the insurance company. Nothing in *Pereira v. United States*, 347 U.S. 1 (1954), justifies such a rule, especially where, as here, the insurance company is located just a short distance from the agent's place of business.

those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann, supra,* at 95; *Parr, supra,* at 389. In *Kann,* the defendants, as a part of a fraudulent scheme to defraud their corporate employer, obtained checks payable to themselves which were cashed or deposited at various banks. These checks were then mailed for collection by banks which honored them to the banks on which they were drawn. The Court held that the mailings were not for the purpose of executing the scheme since "[i]t was immaterial to [the defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." 323 U.S. at 94. In *Parr,* the fraudulent scheme involved *inter alia* the defendants' unauthorized use of a credit card to charge certain purchases. The mailings alleged were comprised of invoices sent by the retailer to the real owner of the credit card. Again, the Court stated that "it was immaterial to the [defendants] and to any consummation of the scheme how the [oil company] . . . would collect from the [credit card owner]." 363 U.S. at 393. Accordingly, the Court held, the mailings were not for the purpose of executing the scheme within the meaning of the statute.

Maze, supra, this Court's most recent application of 18 U.S.C. § 1341, involved a fraudulent scheme to secure goods and services on a stolen credit card. The indictment specifically alleged that the defendant knew that each merchant would cause the sales slips of defendant's purchases to be delivered by mail to a particular bank which would mail them to the credit card owner for payment. The indictment also alleged that the delay caused by this mailing enabled the respondent to continue purchasing

ods and services for an appreciable period of time. The Court, reaffirming the principles established in *Kann* and *Parr*, held that these mailings were not "sufficiently related to respondent's scheme to bring his conduct within the statute." 414 U.S. at 399. The essential basis for this holding was that the success of Maze's scheme did not depend on whether the invoices were mailed: "Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all." 414 U.S. at 402.

Contrary to the Eighth Circuit's view, the *Maze* decision is not inapplicable to this case. This Court's analysis in *Maze* does not turn solely upon whether the mailing occurred before or after the fruits of the fraudulent scheme were received. Indicative of this is that the Court in *Maze* reaffirmed *United States v. Sampson*, 371 U.S. 75 (1962), a case in which the mailings occurred after the fruits of the scheme were received but were deliberately planned by defendants to lull victims into a false sense of security. Under the *Maze* analysis, the mere fact that the mails are caused to be used prior to completion of the alleged fraudulent scheme is not sufficient to make the mailing "for the purpose of executing" the scheme as required by the statute. Rather, the mailing must be strictly scrutinized to determine if a sufficient relation exists between the mailing and the scheme to bring conduct within the purview of federal jurisdiction which would otherwise be a matter solely for state jurisdiction. The minimum relationship which appears to be required by *Maze*, *Kann* and *Parr* is that the mailing be

material to the defendants or to the consummation of their scheme.[2]

The mailing alleged in this case was totally immaterial to petitioner or to his alleged accomplice and to consummation of the scheme charged. Consummation of this scheme depended solely upon the position of Dace, the Hartford insider, which enabled him to draw a check against Hartford on his own authority for payment of what he knew to be a false damage claim. Whether the insurance application was mailed or hand-carried to Hartford by Dobinsky, the Hartford agent, or whether it was ever delivered to Hartford at all, was immaterial to petitioner, Dace or the consummation of the scheme.

Numerous uncontradicted facts set forth in the Statement of the Case, *supra*, in addition to the very nature of the scheme charged, support the conclusion that the alleged mailing was not for the purpose of executing the scheme. Among these are that the insurance was bound indefinitely by telephone prior to submission of any application; Dace knew that Dobinsky often hand-carried

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[2] The dissenting opinion in *Maze* does not appear to disagree with the tests applied by the majority to determine the relationship of the mailing to the scheme. Rather, the dissenting Justices viewed the mailings in *Maze* as an essential element of the scheme to defraud credit card holders. 414 U.S. at 412. That materiality to the defendants or the consummation of their scheme is the proper test is also supported by the Court's discussion in *Maze* of *Pereira v. United States*, 347 U.S. 1 (1954) and *United States v. Sampson*, 371 U.S. 75 (1962). The Court in *Maze* viewed the mailing in *Pereira* as playing "a significant part in enabling the defendant in that case to acquire dominion over the $35,000 with which he ultimately absconded." 414 U.S. at 401. *Sampson* was viewed as involving a "deliberate, planned use of the mails . . . to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." 414 U.S. at 403.

insurance applications to Hartford and would not have planned a scheme, the consummation of which at all depended on an insurance application being mailed by Dobinsky; the application in question, allegedly mailed on December 29, 1969, was returned to Dobinsky by Hartford and was not redelivered by Dobinsky to Hartford until some time later; Hartford treated insurance applications the same whether they were received by hand or mail; and use of the mails to bridge geographic distances would not have made consummation of the scheme more likely, since the scheme was conceived and carried out entirely within St. Louis County, in the State of Missouri, and the alleged mailing covered a distance of no more than 12 miles.

Petitioner respectfully submits, therefore, that the Court should review the Eighth Circuit's opinion herein for the purpose of clarifying that the *Maze* opinion does not turn solely on the mechanical test of whether the alleged mailing occurred prior or subsequent to fruition of the alleged fraudulent scheme, but on analysis of the materiality of the mailing to a defendant or to the consummation of his scheme. As important, the Court also should grant the writ of certiorari to provide the federal courts with the proper framework for analysis of the dividing line between federal and state jurisdiction under the mail fraud statute, particularly in a case such as this where the alleged mailing occurred, if at all, prior to completion of the alleged fraudulent scheme. The Eighth Circuit's opinion obscures the dividing line reaffirmed in *Maze*, and the task is committed to this Court to redress the sensitive balance between federal and state criminal jurisdiction and to provide the analysis upon which the

federal courts can correctly and consistently apply the jurisdictional requirements of 18 U.S.C. § 1341.[3]

This Court over the years has vigorously promoted strict construction of federal jurisdictional statutes involving criminal sanctions and having the potential for making inroads into a domain traditionally left to the several States. The Court has refused to adopt a broad reading of such statutes and has assumed, absent clear direction from Congress, that Congress did not mean to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. *United States v. Bass*, 404 U.S. 336, 347-349 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). As the Court stated in *Bass*: "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." 404 U.S. at 349. This rule of strict construction is also supported by the principle that "no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." *Parr v. United States*, 363 U.S. 370, 394 (1960); *Bass, supra*, at 348. As the Court said in *Parr*: "[T]he showing, however convincing, that state crimes of mis-

[3]Presently before this Court are at least four petitions for certiorari based in whole or in part on the contention that various Courts of Appeals have misapplied or refused to apply the *Maze* decision in reviewing convictions under 18 U.S.C. §1341. See *Flaxman v. United States, petition for cert. filed*, 43 U.S.L.W. 3015 (U.S. June 19, 1974) (No. 73-1894); *Miles v. United States, petition for cert. filed*, 43 U.S.L.W. 3095 (U.S. August 8, 1974) (No. 74-92); *Joyce v. United States, petition for cert. filed*, 43 U.S.L.W. 3111 (U.S. June 27, 1974) (No. 73-1947); *Wallace v. United States, petition for cert. filed*, 43 U.S.L.W. 3126 (U.S. July 3, 1974) (No. 73-1980).

appropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud." 363 U.S. at 393-394.

Use of the federal mail fraud statute to prosecute essentially local crimes was frequently criticized before *Maze* and under a proper interpretation of *Maze* can no longer be permitted. The Court of Appeals for the Sixth Circuit, in its opinion in *Maze*, 468 F.2d 529, 536 (6th Cir. 1972), called attention to the fundamental principle on which the Supreme Court's affirming opinion ultimately turns in these words:

> [T]he jurisdiction of federal courts is defined and limited by the Constitution and congressional action; hence, statutes such as section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. [citations omitted] Moreover, such construction is especially appropriate where, as here, the Government urges that we construe a federal criminal statute so that it reaches conduct which the states could appropriately control and which they can control effectively. (quoting *United States v. Kelem*, 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1970).

Petitioner submits that this Court's decision in *Maze* was intended to curb the Government's extension of 18 U.S.C. § 1341 to virtually every fraud where any use of the mails could be alleged. The opinion of the Eighth Circuit herein runs counter to this intent and ignores the specific limits on federal jurisdiction contained in the mail fraud statute and the principles of construction enunciated by this Court. Since the questions involved in this case are concerned not only with the proper construction of a federal criminal statute but touch the very

heart of this Court's concept of "Our Federalism" [see *Younger v. Harris*, 401 U.S. 37, 44-45 (1971)], issuance of a writ of certiorari to review the Eighth Circuit's opinion is highly appropriate.

CONCLUSION

By reason of the foregoing, petitioner respectfully submits that this petition for a writ of certiorari should be granted and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1004

United States of America,
Plaintiff-Appellee,
v.
Gary Minkin,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 14, 1974.
Filed: September 27, 1974.

Before JOHNSEN and VAN OOSTERHOUT, Senior Circuit Judges and TALBOT SMITH, Senior District Judge.*

JOHNSEN, Senior Circuit Judge.

I.

Gary Minkin, operator of a salvage and used-parts business, was charged in a single-count indictment and

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* TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

convicted on a jury trial of a violation of the mail-fraud statute, 18 U.S.C. § 1341.[1]

The fraud involved, as implicit in the jury's verdict, consisted in Minkin's having devised and executed, together with a claims supervisor of the Hartford Insurance Group (Hartford), named Dace, a scheme to get Hartford to issue a comprehensive insurance policy to Minkin on a 1967 Cadillac El Dorado automobile (stated in the application to be a 1968 model) which had been the subject of payment by another insurance company to its previous owner of a total loss by fire and had then been disposed of by the insurance company to Minkin as a salvage item; making false representation in the application to Hartford that the automobile was "in good mechanical condition and free of any evidence of physical damage"; having Hartford issue a policy as applied for; making claim against Hartford that the automobile had thereafter been the subject of a theft and fire occasioning a total loss to Minkin; and collecting on this basis, by a draft payable to Minkin in the sum of $4,931.85, the proceeds of which he divided with Dace.[2]

Hartford thus was caused to pay Minkin for a loss which he never suffered. Dace, instead of handling the adjustment of the fictitious loss himself, turned it over to an independent adjuster who made examination of the

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[1] Minkin was sentenced to a term of three years, with six months thereof to be served in a jail-type institution, and the balance on probation, conditioned on his making restitution.

[2] Dace had been charged for his part in the fraud in a separate indictment, which also contained twenty-three other counts against him for similar insurance frauds against Hartford. He was permitted to plead guilty to three of all these counts and, according to his testimony, was given a ten-year sentence, which he was engaged in serving at the time of Minkin's trial. These proceedings were had before another district judge.

automobile upon Minkin's car lot, assumed that its condition was the result of the claimed theft and fire, and made appraisal and report that the condition of the car constituted a total loss, with only a salvage disposal being possible in the situation. Dace had precedingly drawn up and placed in the file a fictitious police report purporting to show that the car had been duly reported to the authorities as stolen and then recovered in its burned condition.

The use of the mail relied on in the indictment as basis for the fraud coming within § 1341, consisted in the mailing of Minkin's application to the regional office of Hartford by the broker who had handled the obtaining of the insurance, and in the alleged reasonable foreseeability by Minkin that this mailing would occur as a matter of ordinary business course in the insurance broker's dealing with the application. Under the interpretation made of § 1341 in *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954), and in other court decisions—*e.g.*, *Fisher v. United States*, 324 F.2d 775, 780 (8th Cir. 1963), *United States v. Grow*, 394 F.2d 182, 205-206 (4th Cir. 1968)—the existence of such a foreseeability in the situation would entitle Minkin to be legally regarded as having caused the mailing.

II.

The principal issue presented for review is the sufficiency of the evidence to go to the jury on (a) whether the broker had actually used the mail to forward the application to Hartford, and (b) if so, whether such a use of the mail by the broker could properly be found to have been reasonably foreseeable by Minkin.

On question (a), Minkin argues that there was no direct proof of a mailing of the application having been made

by the broker or his secretary, nor of a receiving of it through the mail having occurred at Hartford. The contention is that there was such possibility that the broker had hand-carried the application to the Hartford office instead of mailing it that reasonable doubt on what the fact was should be held to exist as a matter of law.

The testimony of the broker, however, was positive and unshaken that he had never hand-carried any applications for individual automobile policies to the Hartford office, but invariably handled this class of business by mailing the signed application to Hartford for acceptance and issuance of the policy. He firmly stated that the only class of automobile insurance on which he ever hand-carried any papers to the Hartford office was on commercial risks or accounts, as to which signed applications were not required, but discussion, engineering and negotiation ordinarily were necessary to effect the underwriting and settling of premium rates.

Application forms used by the broker for individual policies bore the name of the company to which the application was to be submitted, and according to his testimony he always drew an arrow on the application pointing to the company's name for mailing purposes by his secretary and then placed it in the secretary's outgoing mail basket. The application here, which was put in evidence from Hartford's files, bore such an arrow mark made by the broker. Any possibility that the secretary could have hand-carried the application to the Hartford office instead of mailing it was negatived by proof that she had never at any time been in Hartford's office.

In addition, the situation was plainly not one of an application having been brought in and a policy carried out in completion of the insurance transaction, for a period of time had intervened between the date on which

the application was shown to have been received by Hartford and the date on which the policy was issued by it. The jury further could find some corroboration as to the application having been mailed in the fact testified to by the broker that during the period involved and for a period preceding he had been putting in only part time at his office because of a heart attack from which he was recovering and had not at all in that time been in the Hartford office for any purpose.

All this provided adequate probative basis for the jury to be allowed to pass on the mailing question and to entitle it to be found that the application had in fact been mailed by the broker to the Hartford office.

On question (b), *supra*, as to the occurrence of such a mailing of the application being reasonably foreseeable by Minkin, we further agree with the trial court that adequate probative basis existed for inference, evaluation and conclusion to entitle the matter of reasonable foreseeability by Minkin to be submitted to the jury. This is a day in which, within common knowledge and experience, the mail has come to constitute an instrumentality of general use in ordinary business incidents. In the situation here, the broker's place of business was located in the suburbs and Hartford's office in the heart of downtown St. Louis, a distance of some twelve miles from each other. We think the jury could properly regard Minkin, who himself operated a substantial business, as not being able credibly to claim that he believed or assumed that the broker in ordinary business course would take the time and undergo the inconvenience of making a twelve-mile trip into downtown St. Louis and back, instead of using a ten-cent stamp, to get the application into the hands of Hartford, and particularly where, as

here, there was recognizedly no emergency or other element of immediacy involved.

But even more directly probative on the question of reasonable foreseeability, there was evidence showing that at the very beginning the broker had used the mail to transmit the application form to Minkin for execution, and that Minkin in turn, after filling it out, had mailed it back to the broker with a check for the premium requested. Also, this use of the mail, both by the broker and by Minkin, in handling the application between them, with the distance thus involved consisting of ten miles, had preceded the mailing of the application to Hartford.

On all these elements together, it would not, in our opinion, be entitled to be held as a matter of law that the mailing of the application by the broker to Hartford was not reasonably foreseeable by Minkin.

That use of the mail to handle such routine application incidents constituted a matter of ordinary business course in the insurance field here involved was further indicated by the facts, which there was testimony to show, that after the broker had mailed the application to Hartford, Hartford returned it to him in the same manner, together with Minkin's check because of an error in the amount of the premium which Minkin had been charged, and that after Minkin had sent the broker a check for the deficiency, the broker "again forwarded the whole thing back to Harfford."

As previously noted, within the interpretation made in *Pereira, supra,* of the term "causes" as used in § 1341, use of the mail as a necessary or facilitating instrument to effect the execution of a scheme to defraud, "where such use can reasonably be foreseen," gives rise to a violation of § 1341. 347 U.S. at 8, 74 S.Ct. at 363. One who engages in carrying out a scheme to defraud is there-

fore responsible under § 1341 for a use made of the mail to effect a necessary or facilitating incident thereof where such use is from the nature of the business and the incident one of such ordinary course as to constitute a matter of natural expectability. A use of the mail which is of such a general, expectable occurrence is entitled to be found to be reasonably foreseeable. Thus, we observed generally in *Fisher v. United States*, 324 F.2d 775, 780 (8th Cir. 1968), as to the ordinary course of such an insurance business as is here involved:

> Certainly in dealing with insurance agents, it will be contemplated that the mails will have to be employed in carrying on business with the different companies for whom the agent does business.

III.

The next contention urged for reversal is that even if the evidence was sufficient to prove that the application had been mailed by the broker to Hartford and that the handling of the application in this manner between the broker and Hartford was reasonably foreseeable by Minkin, the existence of these facts would not be controlling because they had relation to the issuance of a policy and ignored the fact that the broker had subjected the situation to binder coverage while the application was running its course.

The fallacy in this is that there was evidence showing that the policy had been approved and issued by Hartford before the date of the alleged loss. A copy of the policy was shown to be contained in Hartford's files. While Minkin testified that he had never received it, the jury was not required to believe this testimony. Even, however, if the situation could have been one in which the policy had not been received by Minkin personally, but had instead been taken charge of by Dace as a means of

facilitating the handling of the fictitious loss, this would legally constitute a receipt of the policy by Minkin. It would not enable the consequence to be escaped that the policy had been issued, that it legally was in effect, and that the binder coverage had thereby ceased. Moreover, the draft which had been issued to Minkin for the fictitious loss bore on its face the number of the issued policy and could be endorsed and cashed by him only as payment of a loss under the policy coverage.

Attempt has been made to argue to the effect that Hartford's return of the application to the broker and the subsequent remailing of it by the broker to Hartford with Minkin's additional premium check amounted to such a break or change in circumstances as to leave the original mailing of the application without status as an element in the execution of the fraud. The argument is specious. No change was made in the application. The coverage sought by it remained the same. The false representation therein as to the condition of the car continued as the basis for getting the policy issued. The initial consideration of the application constituted a part of the policy approval and issuance process. In short, the submitting of the application by Minkin and the mailing of it by the broker to Hartford as originally made represented means used or caused to be used by Minkin to enable him to accomplish the scheme to defraud.

IV.

A further contention is made that the court erred in refusing to grant a motion for a mistrial because of a conversation about the case and about Minkin which occurred between three postal inspectors while eating lunch at a table in a restaurant located some seven or eight feet away from where two jurors were seated.

The postal inspectors became aware of the presence of the two jurors, they said, when the jurors, after finishing their lunch, passed by the inspectors' table in leaving the restaurant. The inspectors immediately reported the situation to the Assistant United States Attorney, who in turn informed the trial judge and defense counsel of the matter in chambers. Discussion was had of the manner in which the incident ought to be handled. The judge proposed that he would inquire of the jury generally in the courtroom whether any of them had had lunch at the restaurant involved; that he would then question each juror separately, out of the presence of the other members of the jury, who made an affirmative response by raising his hand, on whether he had overheard any conversation or discussion in the restaurant about the case or any similar matter; and that when he had finished his questioning of the individual juror, he would allow counsel to submit any further questions to him which either of them desired to have asked.

Two jurors, which was the number that the postal inspectors stated had passed their table, made affirmative response to the judge's initial inquiry as to eating lunch at the restaurant. The general inquiry as to having eaten lunch at the restaurant was thereafter repeated in order to leave no uncertainty as to the other ten jurors. The judge then excused the members of the jury from the courtroom except one of the responding jurors; engaged in careful questioning of the juror, with counsel present throughout; inquired of each counsel if he had any further questions that he desired to have put to the juror; and upon each of them replying in the negative, had the juror leave the courtroom, the other responding juror brought in and the same procedure engaged in as to him.

Each of the two jurors testified that he had overheard no discussion or conversation of any nature in the restaurant, either about the case, about any situation of similar nature, about Minkin or about anything else. They had simply sat there eating their lunch, talking with each other and leaving the restaurant when they were finished. Each had seen one of the postal inspectors enter the restaurant, but did not observe where he went or became seated, and had heard nothing at all on the part of the inspector or anyone else.

The court then overruled the motion for a mistrial, stating that "all we have here" is that the postal inspectors and the two jurors had eaten in the same restaurant. There occurred no communication or contact or suggestion thereof on which the situation could be "deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1956). As in *Mee v. United States*, 316 F.2d 467, 469 (8th Cir. 1963), there was nothing that was capable of creating any possibility of prejudice.

Defendant contends, however, that the court should have questioned the postal inspectors to make certain that the two jurors were in fact the ones who had been seated seven or eight feet from the inspectors. The court alternatively suggested that the postal inspectors and counsel remain in the corridor until after the jury had taken their seats, and that to avoid attracting the jury's attention, the inspector who had noticed the two jurors could then look through the window in the courtroom door to see if he could identify them. The inspector reported that he was positive as to one of them, but was not able to say as to the other. There is however no room for any reasonable doubt, on the interrogation made and the responses given, that the two jurors were in fact

the ones involved. The court correctly summarized the situation as follows:

> [T]hese two gentlemen, under the closest and more (sic) careful kind of interrogation I can conceive, and separate and apart from each other, and presumably not knowing what we were inquiring about, had the exact same explanation of the events.

There was nothing that called for any further probing or pursuit in relation to the incident.

The court advised the two jurors that there was nothing wrong involved in their having eaten lunch at the restaurant or in the circumstances thereof, but requested that "you not discuss any of this with the other jurors." To have left the situation with an implication in the minds of the two jurors that they were in some way under suspicion of an impropriety, or to have surrounded the situation with such an air of mystery and unnecessary prolongation as to cause the other jurors to become possessed of an absorbing curiosity, might itself give rise to a hampering distraction and even a possible prejudice in the jury's consideration of the case. The court engaged in such proceedings as were necessary to protect the defendant and leave no possible doubt as to the actual facts. The claim of error in the court's refusal to grant a mistrial is without merit.

V.

The final point urged in Minkin's brief is the court's refusal to make available to him the transcript of testimony which Dace had given before a grand jury. The grand jury was not the one by which Minkin and Dace had been indicted, but that fact was not of controlling

significance for the amendment made to the Jencks Act in 1970, 18 U.S.C. § 3500 (e) (3), by which grand jury minutes were brought within the Act, was not limited in its application to those of the grand jury by which the indictment in the case had been returned, but extended to "a statement [of a Government witness], however taken or recorded, or a transcription thereof, if any, made by said witness to *a* grand jury." (Emphasis added.) Such transcript or minutes, however, like other statements or reports within the Act, can be demanded for inspection only "after a witness called by the United States has testified on direct examination" and then only as to the portion thereof "which relates to the subject matter as to which the witness has testified." § 3500(b).

Government counsel objected to the production of the transcript on the ground that it had no relation to the subject matter of Dace's testimony on the trail. The court reviewed the transcript *in camera*, supplied defendant with a copy of a small portion thereof, and ordered the transcript sealed. In the part which was thus supplied, Dace admitted that he had previously been convicted in a Missouri state court of the fraudulent use of a credit card. Our examination of the sealed transcript shows that Dace had also admitted to the grand jury that he was at the time under indictment for the Hartford fraud offense (see fn. 2, *supra*), but that fact had been brought out in his testimony (and Minkin also otherwise would certainly have known of Dace's indictment), so that it would not be possible for any error or prejudice to exist or be claimed from the court's having overlooked providing Minkin a copy of Dace's testimony in this respect.

As the trial court held on its initial reading of the transcript, "there is no reference whatsoever [therein] to Mr. Minkin directly or indirectly or inferentially or otherwise." The court took occasion after adjournment for the day to again go over the transcript and further stated the following morning: "I am totally convinced that there is nothing in there that relates to the subject matter of this case." Our reading of the transcript substantiates that appraisal. Defendant was not entitled to have the transcript.

VI.

Minkin has interspersed his argument on some of the issues which he has raised, as discussed above, with challenges to parts of the court's instructions and to the failure to give some instructions tendered by him. These challenges are without merit. He asserts, for instance, that "[i]n giving various instructions the court continuously conveyed to the jury the impression that mailing of the letter could be presumed." He points to such expressions as "at the time it was mailed," "at the time the application for insurance was mailed or caused to be mailed," and "the letter mailed." These phrases have been lifted out of the setting in which they occur. They represented simply general language in instructions which dealt with and whose purpose was to call the jury's attention to elements which would require it to acquit. One example is sufficient to demonstrate:

> If the jury should find that at the time the application for insurance was mailed or caused to be mailed, as charged, the application for insurance so mailed was then true and correct, the fact that the Cadillac El Dorado may thereafter have become

in poor condition and not free from fire damage, would not warrant a verdict of guilty.

The court had previously told the jury that use of the mail in furtherance of the scheme to defraud was an essential element of the offense charged; that the burden was on the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; that it was the jury's right and responsibility to determine all the facts; and that it had been the court's purpose "to express no opinion upon the facts in the case." There is nothing in the instructions given when considered on this basis that could cause the jury to be misled. Similarly, on such consideration of the court's charge, there was no error in the court's refusal to give the tendered instructions.

VII.

For some reason which is not apparent, only the mailing of the application by the broker to Hartford was relied on in the indictment. Other mailings, however, such as Minkin's forwarding of the executed application and premium check to the broker, which there was evidence to show had occurred, were, nonetheless, competent and relevant upon the question of Minkin's foreseeability.

We also should add that *United States v. Maze*, U.S. , 94 S.Ct. 645, 38 L.Ed.2d 603 (1974) relied on by Minkin is inapplicable here. The mailing in *Maze* was held by the Supreme Court to have occurred after the scheme to defraud there involved had "reached fruition," or in other words had been executed. Here the mailing of the application was a salient factor in effecting the execution of the scheme.

Other arguments have been made in Minkin's brief on evidentiary aspects which involve mere factual issues that have been determined by the jury's verdict.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1974

No. 74-1004,	)	
	)	Appeal from the United States District Court for the Eastern District of Missouri.
The United States,	)	
Appellee,	)	
	)	
v.	)	
	)	
Gary Minkin,	)	
Appellant.	)	

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

The petition for rehearing filed by counsel for appellant is also denied.

October 18, 1974